result of his explanation or correction, there is no more inconsistency, the matter ends there, otherwise the witness is liable to be contradicted. Thus as a first step it is essential that the court should be given the discretion to determine a preliminary question whether the witness' former statement is inconsistent with his evidence, otherwise much time will be wasted if it is found later that his former statement is not really irreconcilable with his evidence. We therefore think that it is a good procedure that a judge should be shown the statement as a first step in the impeachment procedure.

Regarding proof of the former statement, this could be given by putting into the witness box the person, to whom the relevant statement was made or by whom it was recorded. The proof should show that the witness did make the relevant statement. In the case of an oral statement, evidence must be given what that statement was, but where the previous statement was written or reduced into writing, the writing itself should be produced. If the original writing is not available, with further proof as to its non-availability, a copy of the writing could be admitted. This is what happened in *Lim Ba Ba's* case, where a carbon copy was admitted and the court held that this was perfectly in accordance with the law. In the case of a cautioned statement, the Police Officer recording it, in addition to giving evidence that he recorded the statement under caution has to go further and show that it was voluntarily made. Thus the procedure laid down in *Munusamy's* case as applied to a cautioned statement only adds one more rule in that it requires the prosecution to show that the statement was voluntarily made. It must be remembered here that, lest we may be misunderstood, the proof of the inconsistent statement, whether under caution or not, under this procedure, does not constitute evidence of fact, but only evidence of inconsistency because of the contradiction of the evidence of the witness with his former statement. In other words the former statement is not replacing his evidence which has been contradicted, but only renders his evidence completely untrustworthy.

As regards the time when proof of a cautioned statement should be undertaken for the purpose of impeaching the credit of a witness, we are of the view that this could be given either before or after contradicting the witness. The only disadvantage is that if this proof is given after the witness has been contradicted there is always a possibility that the cautioned statement after an inquiry may not be held admissible. In that event all the previous efforts to impeach credit are lost and become a mere waste of time. It seems therefore preferable that in the case of impeaching the credit of a witness by the use of his cautioned statement, proof of the statement should be given before contradiction takes place.

Reverting to the present appeal we restate our conclusion as follows. The first appellant's appeal being based on the finding of facts and as we see no reason to disagree with the learned judge in arriving at the finding, we therefore dismiss his appeal. Regarding the appeal of the second appellant, the appeal is equally based on the findings of facts. We see no merits in the attacks made on the finding by the learned judge. The only point which was urged in his favour worthy of our consideration is a technical one in that the learned trial judge did not make a specific finding that the cautioned statement of the second appellant used by the prosecution to impeach his credit was voluntarily made, though in the inquiry held for the purpose the prosecution had adduced enough evidence to enable the learned trial judge to make such finding and such evidence was in no way contradicted. In our judgment such omission in the circumstances of the case does not constitute a miscarriage of justice and we therefore dismiss his appeal.

Appeal dismissed.

Solicitors: *Subra Naicker & Co.; Karpal Singh & Co.*

SELANGOR OMNIBUS CO. BHD. v. PERUMAL & ANOR.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) March 7 & 18, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 114 of 1978]

Industrial Law — Dismissal of workman on ground that he had no reasonable excuse for his absence from work nor had he informed employer of excuse for absence — Workman alleging he was ill and had informed employer — Representation to Minister — Order for reinstatement by Minister — Discretion of Minister — Whether workman concerned in a trade dispute — Finality clause — Effect of — Industrial Relations Act, 1967, ss. 15, 16A, 27 & 60F.

Administrative Law — Certiorari — Order of Minister — Representation to Minister by workman — Order for reinstatement by Minister — Discretion of Minister — Whether court could interfere — Finality clause — Effect of — Industrial Relations Act, 1967, ss. 15, 16A, 27 & 60F.

In this case the first respondent, a workman, had been dismissed by the appellants as in their view the respondent had broken his contract of service. It was alleged that he had no reasonable excuse for his absence from work nor had he informed or attempted to inform his employer of the excuse for such absence. The respondent claimed that he had a reasonable excuse in the state of his health and that he had informed his employers. He thought his dismissal unfair and he made representations to the Minister. The Minister requested the Commissioner of Labour to enquire into the dismissal and make his report. On the strength of the Commissioner's report the Minister was satisfied that the workman had been dismissed without just cause or excuse. He made an order for reinstatement. The appellants applied for an order of *certiorari* to quash the decision of the Minister. The application was dismissed in the High Court and the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) in general the court's power of challenge of the Minister's decision, where as in this case he is empowered to act "if satisfied", arises only where he has acted in bad faith or against the rule of natural justice or where facts do not exist upon which the Minister could reasonably determine the question before him and, unless the jurisdiction of the court is statutorily ousted, for an error of law;

(2) the respondent in this case was a workman within the Industrial Relations Act, as the definition in the Act included an individual whose complaint of dismissal without just cause or excuse could be dealt with under section 16A of the Act;

(3) the ouster provision in section 16A(5) of the Industrial Relations Act, 1967, is sufficiently wide to remove *certiorari* based on an allegation of an error of law. The

learned judge was right in holding that there was no error of law and no error of jurisdiction.

Cases referred to:-

(1) *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] A.C. 1014, 1047.

(2) *Secretary of State for Employment* v. *ASLEF (No. 2)* [1972] 2 Q.B. 455.

(3) *Attorney-General of St. Christoper, Nevis and Anguilla* v. *Reynolds* [1980] 2 W.L.R. 171.

(4) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.

(5) *South-East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Minerals Products Manufacturing Employees Union* [1980] 2 M.L.J. 165; [1980] 2 All E.R. 689.

(6) *Pearlman* v. *Keepers and Governors of Harrow School* [1979] Q.B. 56.

(7) *In re Racal Communications Ltd.* [1980] 3 W.L.R. 181; [1980] 2 All E.R. 634.

FEDERAL COURT.

K.L. Rekhraj for the appellants.

R. Ponnudurai for the 1st respondent.

Susila Param (Federal Counsel) for the 2nd respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): By originating motion filed on October 18, 1975, the appellants sought for an order of *certiorari* to quash the decision of the Minister of Labour and Manpower (the Minister) made on May 24, 1975 under the then section 16A of the Industrial Relations Act, 1967 (the Act). In the statement supporting the motion, the order of the Minister was attacked on the grounds that (1) it was wrong in law on the face of the record, (2) it was contrary to the provisions of the Employment Ordinance, and (3) it was in excess of his jurisdiction.

The brief facts on which the application was made are as follows: the first respondent (the workman) was suspended from work for one week from December 13-19, 1974 for misconduct. After the expiry of that week on December 20, he did not report for work. A letter of dismissal was sent him on December 27 but it was returned undelivered. It was only on January 8, 1975 that he first reported for work, with medical certificates issued by the District Hospital Kajang to cover the period of his absence from work. The appellants maintained he had been dismissed.

Section 15(2) of the Employment Ordinance, 1955 at the relevant time read:

"15(2) A labourer shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two days —

(a) without prior leave from his employer or without reasonable excuse; or

(b) without informing or attempting to inform his employer of the excuse for such absence."

This section had, in the circumstances, to be read with section 60F(2) which provided that

"(2) A labourer who absents himself on sick leave

....

(b) which is certified by a medical officer but without informing or attempting to inform his employer of such sick leave within forty-eight hours of the commencement thereof,

shall be deemed to absent himself from work without the permission of his employer and without reasonable excuse for the days on which he is so absent from work."

The appellants relied on these provisions to justify the dismissal. In their view, the respondent had broken his contract of service. He had no reasonable excuse for his absence from work, nor had he informed or attempted to inform his employer of the excuse for such absence.

The respondent considered he had such a reasonable excuse in the state of his health and he contended he had informed his employers. He therefore thought his dismissal unfair and he availed himself of the provisions in the then section 16A of the Act.

That section which has since been repealed and re-enacted with several distinct differences in section 20, reads in its relevant parts as follows:

"16A(1). Where a workman considers that he has been dismissed without just cause or excuse by his employer, ... he may, within one month of such dismissal, make representations in writing to the Minister to be reinstated in his former employment.

(2) The Minister may, before making a decision on any such representations, request the Commissioner to enquire into the dismissal and report whether in his opinion the dismissal is without just cause or excuse and in such an enquiry the workman may be represented by his trade union.

(3) The Minister, if he decides to deal with the representations himself, may before making a decision thereon give an opportunity to the employer and his trade union and to a trade union representing the workman to be heard.

(4) If, after considering the representations of the workman and of the employer (if any) and any report made by the Commissioner under subsection (2) the Minister is satisfied that the workman has been dismissed without just cause or excuse he may, notwithstanding any rule of law or agreement to the contrary —

(a) direct the employer to reinstate the workman in his former employment and to pay the workman an amount that is equivalent to the wages that he would have earned had he not been dismissed by the employer; or

(b) direct the employer to pay such amount of wages as compensation as may be determined by the Minister, and the employer shall comply with the Minister's direction.

(5) The decision of the Minister on any representations made under this section shall be final and conclusive and shall not be challenged in any court or in a court established under this Act.

....

(9) Notwithstanding the provisions of the foregoing subsections, the Minister may of his own motion if he is satisfied that it is expedient so to do or on the joint request of the trade union refer any dismissal to the court for settlement."

On his representation made well within the time limited, the Minister requested the Commissioner to enquire into the dismissal and make his report. Both the workman and the employers by their representatives were present. It is not the case for the appellants that they were not heard. On the strength of the Commissioner's report, the Minister was satisfied that the workman had been dismissed without just cause or excuse. He felt no need to resort to the provisions of subsection (9) to refer the case to the Industrial Court and he himself made an order for reinstatement of the respondent in his employment.

In a representation under section 16A, so long as the principles of *audi alteram partem* expressed in subsection (3) and implied in subsection (2) and of free-

dom from bias are observed, the critical question is whether the Minister is satisfied. As observed by Lord Wilberforce in *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council,*[1] substituting Minister for Secretary of State,

(1) The section is framed in a "subjective" form — if the Minister "is satisfied." This form of section is quite well-known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that: If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Minister alone, the court may inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If those requirements are not met, then the exercise of judgment, however *bona fide* it may be, becomes capable of challenge: see *Secretary of State for Employment* v. *ASLEF (No. 2)*[2] *per* Lord Denning M.R. at page 493.

(2) The section has to be considered within the structure of the Act. In many statutes a Minister or other authority is given a discretionary power and in these cases, the court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinions for that of the Minister: they can interfere on such grounds as that the Minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact. But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at.

The *Tameside* case was considered by their Lordships of the Privy Council in *Attorney-General of St. Christopher, Nevis & Anguilla* v. *Reynolds*[3] where it was held that "if the Governor is satisfied" means "if the Governor is satisfied upon reasonable grounds that any person has recently been concerned in acts prejudicial to the public safety or to public order and that by reason thereof it is reasonably justifiable and necessary to exercise control over him with an order for his detention under the Emergency Powers Regulations, 1967." Where the statement specifying the grounds upon which he is detained required to be served on him by the Constitution does not specify the grounds, it is an irresistible inference that no grounds exist, the detention order is invalid and the detention unlawful.

In general, therefore, the court's power of challenge of the Minister's decision arises only where he has acted in bad faith or against the rules of natural justice or where facts do not exist upon which the Minister could reasonably determine the question before him and unless the jurisdiction of the court is statutorily ousted, for an error of law.

It is not the appellants' case that the Minister had acted in bad faith or had not observed all the elementary rules of fairness before he came to his decision that the dismissal of the respondent was without just cause or excuse. He had given the employers a full hearing. On the law, he had not failed to direct his mind that so as not to break his employment with the employers, the employee on sick leave must inform or attempt to inform his employers within 48 hours of the fact that he is unable to work by reason of sickness or ill-health and on the evidence, after hearing both sides, he was satisfied that the respondent had kept his side of the bargain.

But it also appears to be the contention of the appellants that though the respondent might have been an employee under the Employment Ordinance, he was not a workman within the Act since under the definition of workman in section 27 of the Act, he must be a person concerned in a trade dispute and he was not such a person.

The definition of a workman in the Act reads as follows:

> "Workman means any person, including an apprentice employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute."

The contention of the appellants both in the High Court and before us appears, unless we have grossly misunderstood them, to be that "and" is conjunctive and therefore a workman claiming under the Act must be involved in a trade dispute, but being in the singular, he could not be so involved since the definition of "trade dispute" in the Act refers only to "workmen." The learned judge held that "and" is disjunctive and therefore included an individual whose complaint of dismissal without just cause or excuse would be dealt with under section 16A, as well as one who being a member of a trade union could bring questions of his dismissal, discharge or retrenchment under the then section 23 (now section 26) through a trade union as a trade dispute where such dismissal, discharge or retrenchment had led to that trade dispute. With respect, we entirely agree.

The learned judge did not consider the effect of subsection (5) which provides that the decision of the Minister on any representation under the section shall be final and conclusive and shall not be challenged in any court. Quite clearly this provision must be given effect to in any application for *certiorari*. In the leading case of *Anisminic Ltd.* v. *Foreign Compensation Commission,*[4] the House of Lords held unanimously that a provision that the act or order of the Commission "shall not be questioned in any legal proceedings whatsoever" ousts the jurisdiction of the courts in judicial review except for a determination that was outside jurisdiction and by a majority that misconstruction of the order in Council which the Commission had to apply involved an excess of jurisdiction since they based their decision "on a ground which they had no right to take into account" *per* Lord Reid at page 175 and sought to "impose another condition, not warranted by the order," *per* Lord Wilberforce at page 214.

Despite *Anisminic,* our High Court continued to have to entertain applications for *certiorari* on the

grounds of error of law where the ouster of the court's jurisdiction to quash the orders and decisions of inferior tribunals has been clearly limited to errors of jurisdiction. The instant case is but one of them, at least in part. Whatever doubts there remained have now been removed by the Privy Council judgment in *South-East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Minerals Products Manufacturing Employees Union.*[5] The section considered was a different section, the then section 29(3)(a) (now section 32(3)(a)) but it is clear that the Privy Council considered that part which read "quashed or called in question in any Court of Law" to uphold the "powerful dissent" of Geoffrey Lane L.J. in *Pearlman* v. *Keepers and Governors of Harrow School*[6] at page 74, which has now become the law in England with its approval in *In re Racal Communications Ltd.*[7] The judgment of the Privy Council clearly rules that

"... if the inferior tribunal has merely made an error of law which does not affect its jurisdiction and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective. *In Pearlman* v. *Keepers and Governors of Harrow School* (1979) Q.B. 56, 70, Lord Denning M.R. suggested that the distinction between an error of law which affected jurisdiction and one which did not should now be 'discarded'. Their Lordships do not accept that suggestion. They consider that the law was correctly applied to the circumstances of that case in the dissenting opinion of Geoffrey Lane L.J. when he said at p. 74:

'... the only circumstances in which this court can correct what is to my mind the error of the (County Court) judge is if he were acting in excess of his jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of 'structural alteration' ... or addition.'"

The only material difference between section 29(3)(a) and section 16A(5) of the Act is the presence of the word "quashed" in the former section. In our view, having regard to the decision in *Anisminic*, the ouster provision in section 16A(5) is sufficiently wide to remove *certiorari* based on an allegation of an error of law.

The time has surely come for a critical examination of the very many applications that have been made in the past and still await decision either at first instance or on appeal. The doctrine of precedent and commonsense as well as the practical considerations of cost and time must mean that where the application is based on an error of law, it should now be abandoned, unless of course the applicant can make out a case that such an error is in fact and in law an error of jurisdiction.

But very clearly the learned judge was right in finding no error of law, and though he did not say so, it is implicit in his decision, no error of jurisdiction.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Solicitors: *K.L. Rekhraj & Co.; Rajendra & Teik Ee.*

PALANIAPPA CHETTIAR v. LETCHUMANAN CHETTIAR

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Salleh Abas F.JJ.) October 1, 1980 & March 30, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 180 of 1979]

Land law — Caveat — Application for removal of caveat — Considerations in favour of maintaining caveat outweigh those in favour of removing it.

In this case the respondent was the executor of the estate of his father, who before his death was the Karta or manager of a Hindu Joint Family consisting of the deceased and the respondent and the appellant, who were step-brothers. Probate was granted to the respondent subject to the condition that an order of court should be obtained before disposal or distribution of any property bequeathed under the will. The appellant in other proceedings had alleged mis-management of the properties by the late father and accounts had been ordered to be filed. The respondent applied to court for the sale of a piece of land belonging to the estate and with the appellant's consent an order was made. Subsequently it was discovered that the title of the land had been under caveat by the appellant. The respondent applied for the caveat to be removed. The appellant had stated that he would agree to the removal of the caveat if the Karta's 1/3 share of the proceeds of sale be kept on a fixed deposit until the accounts were taken. The respondent did not agree and the learned Judge made an order for the caveat to be removed. The appellant appealed.

Held, allowing the appeal: in the circumstances of this case, the considerations in favour of maintaining the caveat outweigh any consideration that had been shown in favour of removing it. The caveat should therefore be restored.

Cases referred to:-

(1) *Palaniappa Chettiar* v. *Lakshamanan Chettiar* [1979] 1 M.L.J. 119.

(2) *Arunasalam Chettiar & Ors.* v. *Palaniappa Chettiar* [1974] 2 M.L.J. 133.

FEDERAL COURT CIVIL APPEAL.

R.R. Sethu for the appellant.

Atma Singh Gill for the respondent.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): The respondent applied to the High Court at Seremban for sale of a piece of land (Grant 8457, Lot 538, Port Dickson), part of the estate of the deceased father of the parties who are step-brothers. With the appellant's consent the order was made. It was later discovered that the title of the land had been under caveat since 1951 and extended with consent by the respondent in 1958. The respondent applied for the caveat to be removed to facilitate transmission of the title. The application was granted. The appellant appealed against the removal of the caveat. We allowed the appeal. These are our reasons.

The affidavit accompanying the application for sale of the land by the respondent can be briefly stated thus: the respondent was executor of the estate of the father, who before his death was the Karta or manager of the Hindu Joint Family of the PL.AR. Firm of Port Dickson which consisted of the deceased and the two step-brothers. On January 22, 1977 the learned trial judge ordered that the probate of the said will be granted to the respondent except that the testator's one-third share, i.e. the Joint Hindu Family of PL.AR. Firm of Port Dickson be excluded and that this $\frac{1}{3}$ share shall form part of the deceased's estate in